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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 15, 2006

The Committee on Legal Services met on Wednesday, March 15, 2006, at 7:44 a.m. in HCR 0109. The following members were present:

Representative McGihon, Chair
Representative Carroll T.
Representative Hefley
Representative King
Representative Marshall
Senator Groff (present at 7:58 a.m.)
Senator Grossman, Vice-chair

Representative McGihon called the meeting to order. She said the first order of business is Senate Bill 06-106 - Rule Review Bill.

Jo Romero, President, Colorado Federation of Public Employees (CFPE) testified before the Committee. I'm here to testify with regards to one of the rules that is not in the rule review bill, which is administrative procedure 4-14. of the department of personnel. First, I would like to say that the CFPE does support the nonextension of the administrative procedures promulgated and adopted by the executive director of the department of personnel as set forth in this bill and requests the Committee's favorable action in that regard. We further respectfully request that the Committee not extend administrative procedure 4-14., which was also promulgated and adopted by the executive director and which became effective July 1, 2005, because we believe it impermissibly contravenes the constitution and enabling statutes and is in excess of the authority of the executive director. Administrative procedure 4-14. deals with the selection process for positions in the state personnel system and includes a significant departure from traditional competitive testing and moves to an assessment of qualification. I'd like to walk through

the legal background of this rule, starting with the constitution, which requires that appointments and promotions in the state personnel system be made according to merit and fitness, as determined through competitive tests of competence. Article XII, section 13 (1) of the state constitution provides that appointments and promotions to offices and employments in the personnel system of the state shall be made according to merit and fitness, to be ascertained by competitive tests of competence without regard to race, creed, or color, or political affiliation. Article XII, section 13 (5) of the state constitution further reinforces this requirement by providing that the person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence, subject to limitations. The implementing statute for these constitutional provisions further defines the permissible scope of these competitive tests of competence relative to the selection system under the state personnel act. Section 24-50-112.5 (1) (b), C.R.S., provides that appointments and promotions to positions shall be based on job-related knowledge, skills, abilities, competencies, behaviors, and quality of performance as demonstrated by fair and open competitive examinations. The statute goes on to specifically provide precise guidance concerning the basis of these open competitive exams. It says that examinations shall be based on specific job-related knowledge, skills, abilities, behaviors, and other competencies. Examinations shall be conducted as needed and only qualified applicants shall be included in the examination process. The constitutional requirement that persons employed or advancing in the state personnel system be only those who have demonstrated qualifications through testing or examinations has been consistently upheld by the Colorado supreme court since 1918. Referendum A, which was defeated by the voters in November 2004, did propose an amendment to the constitution to, among other things, eliminate "competitive tests of competence" and substitute "comparative assessments of qualifications". The companion implementing statutes contained provisions in House Bill 04-1373, which was contingent on passage of Referendum A, and further proposed to amend the language in the statutes and eliminate "competitive tests of competence" and substitute "comparative assessments of qualifications". A critical legal and policy issue underpinning Referendum A and House Bill 1373 should be remembered: A constitutional change is required before "competitive tests of competence" can be eliminated or amended.

Ms. Romero said I'd like to just go through the constitutional and statutory infirmity of the procedure, and what is actually wrong with the procedure. Administrative procedure 4-14. impermissibly incorporates the failed

language and concepts in Referendum A and House Bill 1373, notwithstanding the fact that the constitution has not been changed. Specifically, the administrative procedure provides that the assessment process is considered to be competitive if a reasonable opportunity was provided to potentially qualified persons to apply and compete against the same job-related standards. Examinations include any professionally accepted assessments of qualifications, competencies, and job fit. Examinations may include, but are not limited to, one or more of the following: Record review, structured interviews, written tests, performance, oral, physical, training evaluations, experience evaluations, performance evaluation ratings, or any job-related assessment. Furthermore, all examination materials and scores are confidential except as provided by the Colorado public records act. Administrative procedure 4-14. impermissibly uses "assessment process" as a substitute for the "selection process" as required by law. Next, it alters the scope and basis of permissible examinations by including "assessments of qualifications" and "job fit", terms and concepts not found in the constitution or the implementing statute. Further, it allows "record review", "structured interviews", and "any job-related assessment" to be the sole criteria for selecting an employee. Again, none of these terms or concepts are permitted as a substitute for "examinations" as constitutionally and statutorily permitted and defined.

Ms. Romero said finally, there are some policy considerations. The purpose of the state personnel system, as noted in statute, is to assure that a qualified and competent work force is serving the citizens through a competitive and impartial method. That's also been upheld by case law. The purpose of requiring competitive examinations is to promote the efficiency of civil service by selecting employees according to merit and fitness as determined by competitive tests of competence. Again, that is in the constitution. Selection and promotion based on merit frees the state personnel system from political pressures and thereby curtails political patronage. There is case law to uphold that. Administrative procedure 4-14. allows department heads and managers to utilize subjective, and potentially biased, criteria as "permissible" tools for selecting and promoting employees. "Record review", "structured interviews", and "job fit" are not only constitutionally and statutorily unauthorized, they undermine the requirements that selection and promotion be impartial, unbiased, and objective. Further, the determination of "job fit" runs contrary to the anti-discriminatory requirements in the constitution that selections be made regardless of race, creed, color, or political affiliation. Personality tests are occasionally used to determine "job fit" and these tests have been criticized as leading to unfair or illegal discrimination against minorities and protected classes, and may be susceptible to being utilized as

a screening mechanism leading to profiling. In conclusion, CFPE submits that the executive director has exceeded his authority in promulgating and adopting administrative procedure 4-14., and that the procedure impermissibly modifies or is inconsistent with existing constitutional and statutory provisions. CFPE respectfully requests the Committee amend Senate Bill 106 to include this administrative procedure as one that is not extended.

Representative Marshall said Ms. Romero may not know that I am certified in test development. I have to say, first of all, that I don't think this rule is really outside the parameters that the department has available to them in terms of assessments. "Qualifications" is a competitive exam. "Applications" can be used as a competitive exam. That terminology itself I don't think is outside the scope of what they're available to do. As for your assessment of the words "job fit", I may actually concur with you partially on that. It's also very clear that many, many, many tests that are used in state personnel and other organizations that are sort of cookie cutter examinations that are written assessments have a lot of adverse impact on minorities and women. First of all, they require that experience be the greatest examination as a qualifier and who always has less experience? Women and minorities. That in itself, I don't think I would concur that those words particularly are outside the scope of their abilities. Plus, as I mentioned before, "competitive examinations" is a broad term and the scope of that does include "qualifications". I just don't concur that this is really outside the scope of their abilities.

Ms. Romero said while I think we may agree to disagree on this point, we do agree with some of what you said. I think there is some ability to move in a different direction and have a wider scope. The problem we have, however, is that we believe it's unconstitutional because it has not gone through the appropriate procedure to change the constitutional language that would allow those kinds of changes to be made in the rule.

Representative Marshall said the analysis from the Office says this could be a close examination, however, they do think the rule is within the scope of their authority in the constitution.

Representative King asked if Ms. Romero's main concern about these rule changes is the area specifically about the exams? Ms. Romero said yes.

Representative King said the way he reads it, they're virtually identical except for the new rule says "any job-related assessment". Is that the portion of the rule you do not think is appropriate? Ms. Romero said originally what I said was that this language was lifted directly from the failed referendum and the

companion legislation. In 2004, it was set forward by the department as requiring a constitutional change in order to make this exact change in the statute and the rule.

Representative King said that's not my concern. My concern is when you look at these examinations that are included in the rules prior to July 1 and after July 1, the only difference seems to be "or any job-related assessment". They actually defined a little more framework in the context of limiting this to say it shall be done within professional guidelines and state law. I guess I'm trying to see if that is your specific concern with this procedure on job-related assessment. Ms. Romero said our specific concern, first of all, is that this procedure was passed without the authority that is necessary, through a constitutional change. Second of all, if you look at the actual language that says examinations may include, but are not limited to, record review, structured interviews, or job-fit, any one of those can be used as full criteria, which means a simple application or a resume is all that's required as an examination. Whereas, the competitive examination, we believe as it has been used historically and traditionally in the system, can be a number of things. There has to be some way to rank individuals and the competitive test is generally one that's tied directly to the job requirements. We don't believe a simple review of a resume or a structured interview should be the full criteria. We don't believe that squares up with what the constitution expects to be done with that process.

Representative Carroll asked if Ms. Romero is testifying that under the constitution there is no room for subjective evaluation at all in the civil service system? Ms. Romero said there probably is already plenty of room for subjectivity. That just naturally occurs. It's our belief that the constitution currently does not allow for this procedure it's suggesting.

Representative Carroll said when he looks at section 24-50-112.5, C.R.S., there's a line in there that talks about skills, abilities, competencies, and behaviors. That would seem to indicate, to me at least, that you can make a fairly strong argument that you can have an assessment of sorts. I'm not sure if I share your conclusion that assessment necessarily leads to some type of hiring process that's outside the constitutional scope. I share Representative Marshall's concern about our current system and its impact on people of color. Most studies show that most standardized tests do have a bias for people of color and do have a bias for people who come from a less fortunate economic background. It's hard for me to defend that system, when it hasn't necessarily worked to increase diversity within our workplace, despite the qualifications of the applicant.

Ms. Romero said I guess it would serve us all well to see whether or not what we believe is true, whether or not the department has actually tracked those numbers or tracked whether there is diversity in the workforce. Years ago, under Gale Norton when she was the attorney general, she removed the statutory obligation[1] that the state had for affirmative action in the state personnel system, and it is our belief that is the only way you're going to assure that people of color and protected classes get an opportunity as you suggest. We don't believe it's due to testing. At one point in time, it was the system where every agency had to look at whether minorities or women were underutilized in the specific department that was looking to hire, because there were some standards that had to be filled. If they were underutilized, the agency could then reach down below that top three to pull up any ethnic minorities or women in that list and bring them up and include them with the other three. We believe that was a fair way to address that issue. Currently, what we are saying is that in 2004, the department wanted to make their change and understood and recognized they had to change the constitution in order to make their change happen. The constitution has not been changed.

Representative Carroll said he wants to go back to the issue of assessments, because the way the department explains the rule, there has to be an assessment that's pretty much standardized on a national or state scale. You frequently mention a cursory overview of resumes, and I'm trying to figure out where you get that conclusion from the plain language of the rule? Ms. Romero said we would have to see what those look like. I think you can infer just about anything because it's so open to any interpretation. In fact, we did ask that question and we did get the response that it could be the review of a resume. Depending on who the appointing authorities are and who appoints those authorities will really tell you who's going to be selected for those jobs. I will say that this opens the door to patronage. If you look at this with another statute that we worked with yesterday that was PI'd in committee, it would have allowed appointing authorities to hire anyone all the way up to maximum salary grade. In combination, it would have allowed a lot more patronage. I think the assessment process itself, again, tied directly to the unconstitutional situation we have, is that we really believe that this has to go through the constitutional revision process. We're not saying it's right or wrong, we're just saying there's a process that needs to be followed. It was followed in 2004, and the voters rejected it. If this needs to be changed, we're saying we need to go back to a constitutional revision to make it happen.

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[1] Staff believes Ms. Romero meant the "rule of three plus three" rule. See page 7 for more discussion on this issue.

Senator Grossman said he's starting to come around to the argument that as a technical, legal matter, the rule goes beyond the authority granted by the constitution. The constitution says competitive examinations. The Colorado supreme court has interpreted that to mean actual examinations, not resume reviews or qualification assessments. I'm starting to come around to that, but help me understand something. When we had some of these other rule issues come before this Committee, we looked at some administrative opinions by administrative law judges (ALJs) who are interpreting this. Do you have actual live cases and controversies where employees in the state personnel system are challenging their failure to hire or rehire based on the failure of the department to use competitive examinations? Ms. Romero said she doesn't have any cases in her head today regarding that issue. It's her feeling, having worked in the system for 21 years and 10 years as the union president, that the issue has not been a huge issue up to this point. It is also our belief that this opens up the state to liability and those questions will come up. Contrary to what some of the members of the Committee believe, I believe that there will be issues with ethnic minorities and women, depending on who is an appointing authority and who appoints those authorities. It will become a very subjective system.

Senator Grossman said he thinks that's really the key here: Is the degree of subjectivity that's created by this rule consistent with the constitution? I would defer to you and Representative Marshall as to how this rule is going to impact people on the ground with regard to diversity. My feeling is if the constitution doesn't contemplate this type of subjectivity, then we shouldn't be allowing the departments to be doing it by rule. I'm having a tough time because I'm not seeing how this would apply on the ground. You said in response to Representative Carroll's question that it depends on who the appointing authority is. Are there people currently in the department who are hiring people and promoting people without competitive examinations? Ms. Romero said not that she's aware of.

Representative Marshall said all hiring is subjective because even when you get to the top three, some manager is interviewing and choosing and by the time they get to that point, it's subjective. I'm glad Ms. Romero continues to work on behalf of what she feels is equal treatment for state employees. Another thing is that you said something I think is rather conflicting. You talked about strict, constitutional application of the personnel system, yet you just said you thought it was fair when they do the three plus three, which is outside the constitution. The constitution allows for the top three, but the rule was to apply the next three in order to be able to use affirmative action and to have a minority have an opportunity to be hired. That three plus three was not

in the constitution, it's still the top three. Also, it was never in statute, either, but was a rule by the department, which Gale Norton, as attorney general then, said was unconstitutional. Ms. Romero said because she was in the system for 21 years and worked in administration and higher ed for hiring, we often had to use that specific rule. I don't remember if it was state education board rule or a director's procedure.

Representative McGihon said on page 3 of Ms. Romero's memorandum, you focus on what concerns me and that I've had discussions with staff about, which is that suddenly the rule changes from one of a selection process to one of an assessment process. How does that apply in the real world? How did that change things in the real world? Ms. Romero said the selection process, as it's set out in statute, requires a specific process that goes through testing as part of the merit system to ensure people are qualified and competent before you are able to select them for those positions. The assessment is looking at the materials before you, which could be an interview or a resume. In selecting a person for a position, there's an entire process that needs to be followed under existing law, and I think the assessment kind of circumvents a lot of that and goes right to a one-step issue. I could call someone and ask them to submit a resume and that's all it would take to hire someone.

Representative McGihon said she heard of an instance where someone was hired to be a human resource director at one of the departments without any qualifications as a human resource director, in terms of giving that person a job after she'd been employed at the capitol. I'm wondering how something like that occurs. Is it more likely to occur under this rule? Ms. Romero said it is our belief it is absolutely more likely to occur and will occur in the future. This is opening up the door to whatever subjective hiring process there is. There are thousands and thousands of state employees who have been in the system for the past 78 or 81 years, however long the civil service system has been in place, that have successfully passed the competitive exams that in the past were far more stringent than they are today. It's in the last 5-6 years that this rule and the statute has changed to allow for a little more flexibility in looking at competency because before that was not there. This rule takes it a step beyond that in allowing people who may not be qualified. It is our feeling that the taxpayers and people of Colorado really walk around and just expect things to be there, like clean water and clean air, and that's the way it should be: Transparent. People don't worry about it because they assume people have been tested and they're qualified and certified to do state jobs. They don't worry about the people testing their water because they believe people are qualified to do those jobs. If this rule goes into place and is allowed to occur, first of all, in our mind it would be unconstitutional and

second of all, it would allow for a lot of questionable qualifications to come into play.

Representative Hefley asked about when Ms. Romero made the statement that they might just have a resume and then be hired. There's rules and qualifications they have to go through. Surely there is an interview. Surely there is background. Surely they look at the resume and call the references and do their due diligence. I can't imagine that I understood that correctly that that's the way it's done. Ms. Romero said unfortunately, it happens. Even now with the current structure, from time to time, it does as Representative McGihon noted. Some people do get hired that are not qualified to do the job. We've had a couple of employees who belong to our union who were dismissed because they weren't qualified to do the job, even after they were hired.

Representative Hefley asked isn't that what we really want, ultimately? To make sure we hire people that are qualified? Ms. Romero said it certainly is. However, I think part of the problem there is going to be with this rule, as it is currently is, is that all examination materials and scores are confidential except as provided by the Colorado public records act. Once this goes into place, we may never be able to see what those examinations are. If you're able to ask a department how did you make this selection, of those materials for that examination process, or what you suggested is the due diligence, what would be available to the public to ensure that due diligence was upheld, that they actually did that? Whether or not that would be public information is the question.

Representative Carroll said I want to clarify that the only part, I believe, that would fall under the public records act would be the actual personnel records of the employees or applicants. I believe the tests are all open to the public.

Mark Schwane, Executive Director, American Federation of State, County, and Municipal Employees (AFSCME) Council 76, testified before the Committee. He said the Council is an umbrella organization of 20 locals around the state. We are a public employees union that represents state, county, and municipal employees. I'm not going to go back over what Ms. Romero said. I think she covered the issue quite well. I just want to reinforce some of the legal points that Senator Grossman brought up and some of the other members discussed. The constitution in this area is very clear on the standard it lays out. Simply stated, it requires competitive tests of competence. State laws reinforce this position, stating that advancement should be based on demonstrated qualifications through testing. This point

has been reinforced by the state supreme court. Procedure 4-14. does not, in our opinion, live up to this standard. Simply stated, it provides that examinations can include any professionally accepted assessment or qualifications, and as somebody pointed out, it also provides any job-related assessment. In our opinion, this allows for subjectivity to come into the process. While subjectivity is certainly part of any assessment, what this new procedure does is take away the objective portions of determining qualifications of potential employees. We believe this is an important principle in upholding the merit system, which the state has long protected in the state constitution and statute. We believe a workforce developed objectively through testing makes for a stronger workforce in the state and further protects against patronage and subjective choosing of employees for state positions. Procedure 4-14. and its reliance on assessment and any job-related assessment opens the door to subjectivity and, in our opinion, patronage. Very simply put, assessment is not testing as defined by the constitution and case law and, for this reason, we believe that procedure 4-14. does not fit within the state constitution and we'd ask that it not be extended.

Representative Hefley asked in Mr. Schwane's organization for state employees, in your particular group, how many members are there? Mr. Schwane said there's approximately 1,000 state employees.

Representative Hefley asked what is the total number of state employees? Mr. Schwane said depending on who you include, like higher education, there's 30,000-35,000.

Representative McGihon said the old rule referred to this "selection process" while the new rule defines an "assessment process". Is there somewhere else where a selection process is placed in a rule? Mr. Schwane said not that he is aware of.

Representative McGihon asked how does Mr. Schwane see the change between a selection process and an assessment process? Is that what makes it arbitrary? Mr. Schwane said, in his opinion, yes. I think under this procedure we've opened the door to any form of picking and choosing that can go on and I think it would be very difficult for anyone to challenge. The phrase "any job-related assessment" is exactly the language I think opens the door to, frankly, any choice based on any reason, be it legal or not legal. That's where we've lost the constitutional standard.

Representative Hefley said she's mulling over in her mind what assessment means. To me, assessment includes every aspect, that it totally includes all

that the selection process would as well. Help me understand how I'm missing this. Mr. Schwane said he thinks Representative Hefley has hit on a very good point that now you've opened the door completely to whatever you want. Assessment includes anything, I think, that someone doing hiring gets to do. They could consider the resume or they could not consider the resume. They could call references or not call references. They could say I called the references and that's my assessment. I think the point is that now you've created a standard that opens the door to any sort of measure we could subjectively call a measure. One concern we've had as we've gone through the process is, in our opinion, nobody really articulated a reason why it can't be the standard of qualified testing. There are certainly many ways to conduct qualified tests. It could be on paper or it could be a test of applicable job skills. There are many ways to test a candidate for a job position. Nobody has said why they can't meet the standard of testing in this process. In our opinion, assessment opens the door to moving away from objective measures and into the realm of subjective measures, which, as Representative Marshall pointed out, is certainly part of every process. Our concern would be making it the only part of the process.

Representative Marshall said I appreciate much of what Mr. Schwane and Ms. Romero said. Frankly, I don't particularly like the language of the rule, but I have to remember what then-chairman, Senator Grossman stated to the Committee so eloquently, and that is that our responsibility is really not the underlying policy, but it's whether the rule fits within the statutory authority of the particular agency. This analysis sounds like they're not outside the parameters of their statutory authority. It makes it difficult for us to go outside the parameters of our responsibilities as this Committee.

Representative McGihon asked if Mr. Schwane is aware of any instances where the rule, as applied, resulted in something that was not testing, where an agency used a resume in that review or some other instance of not using testing? Mr. Schwane said no, he is not, other than anecdotal. I am not aware of a specific case. I'm a staff attorney for the Colorado Federation of Public Employees (CFPE) and I've certainly gotten calls where people felt like there was this shuffling of the rule of three, where tests were manipulated to pull people out of the rule of three. I've heard many stories around that and individual complaints about that. Representative Carroll brought up the open records issue. His assessment of that I think is correct, in that much of this is open. However, chasing it down and getting the hard stuff is often a challenge. Really nailing it down is difficult at times.

Representative McGihon said she asked Dan Cartin to be prepared, after the

testimony, to provide the Committee with his memorandum of the close call on administrative procedure 4-14. I asked Mr. Cartin to revisit this in light of the testimony today.

Dan Cartin, Deputy Director, Office of Legislative Legal Services, testified before the Committee. He said when the personnel rules came to the Committee in December, I believe, there was a discussion of administrative procedure 4-14. on the competitive test examination. I indicated to the Committee at that time that it was a close call for our Office, that when we examined the rule for the first time, we had questions about the assessment language in the rule, that we went and met with the department representatives, and that based on our discussions with the department and information that was provided to our Office, we felt that the rule facially, based on the information we were given, albeit a very close call, was consistent with the constitution and the enabling statute. Briefly, there's been discussion on article XII, section 13 of the state constitution that requires competitive tests of competence in selecting employees, and there's been discussion of section 24-50-112.5, C.R.S., which is the enabling statute the general assembly enacted in furtherance of the constitutional provision. That statute is a little bit more expansive and talks about examinations shall be based on specific job-related knowledge, skills, abilities, behaviors, and other competencies. Administrative procedure 4-14. was adopted and it did change its predecessor to add the assessment language. It specifically added the provision that said examinations include professionally accepted assessments of qualifications, competencies, and job fit. It added the "any job-related assessment" language. When you look at the rule, though, we looked at the language specifically and what it says is the assessment process is considered to be competitive if a reasonable opportunity was provided to potentially qualified persons to apply and compete against the same standards. Examinations include any professionally accepted assessments of qualifications, etc. Examinations shall be developed, administered, and scored. Examinations may include, but are not limited to, one or more of the following: Record review, structured interviews, etc., or any job-related assessment. Assessment tools shall be developed, administered, and scored in compliance with professional guidelines and state and federal law. Notwithstanding the fact that there's a reasonable and legitimate argument that can be made that if you substitute "assessment" for "examination", or if you put assessment into the same discussion as the examination, you're having a softer, more subjective standard of selecting an employee, we felt the language of the rule, giving deference to the agency and its interpretation of the constitution and statute, did not facially conflict with the language of the state constitution or the state statute. We had discussions that if there was

something outside the process where there was evidence that tests weren't being given, that something other than an examination process was being employed in selecting employees, I think the Committee could consider that in determining whether or not to extend the rule. It's a close call, but we believe the rule is facially not inconsistent with the constitution and statute.

Representative McGihon said a moment ago, Mr. Cartin said facially giving deference to the agency. Should we give deference to the agency or is it only a facial matter because you also reached the conclusion that the procedure may arguably not be in compliance with the language of the constitution and statute? Mr. Cartin said in looking strictly at the language of the rule, and reasonable minds can differ on this, it was modified to pick up the assessment language, but it still talks about assessments in the context of examinations and scoring. In that regard, it seems to be consistent, although it was more expansive than the predecessor rule, with the language of the statute, which says examinations shall be based on specific job-related knowledge, skills, abilities, behaviors, and other competencies.

Senator Grossman asked if Mr. Cartin reviewed the case *C.A.P.E. v. Lamm*, 677 P.2d 1350 (Colo. 1984), cited in the CFPE memo? It's a 1984 supreme court case and they're citing in their memo that the case upheld that examinations mean examinations. Mr. Cartin said he has reviewed the case in the context of reviewing all these rules. I don't disagree with that assessment. I would say that. I would also say that there is case law that talks about what a competitive examination is. I think the upshot of what those cases say is the decisions appear to authorize some flexibility in the testing process that may include assessments, so long as the scoring and standards are capable of being challenged and reviewed.

Senator Grossman asked if Mr. Cartin thinks the holdings are compatible, or is that the problem? Mr. Cartin said I think it boils down to what amounts to an examination. I guess what the rule is positing is that examinations can include these assessments. People can be ranked and scored through these types of assessments as part of the examination process. I agree with you and I don't dispute that this is what *C.A.P.E. v. Lamm* says. What I wouldn't say is that *C.A.P.E. v. Lamm* prohibits assessments as part of the examination process.

Representative McGihon said Mr. Cartin said the scoring and standards must be capable of review. What in the rule makes you comfortable with that standard? Mr. Cartin said I guess there's nothing in the rule that speaks to that directly. I think, again, we almost afford a presumption. Since the rule

mentions examinations and scorings and that kind of thing, it seemed that at least facially, the rule contemplated standards and criteria that would withstand review. I don't have anything concrete evidentiary one way or the other on it.

Representative Marshall said examinations are public information and are all subject to public review. I think what we're talking about is the assessment tools themselves and they are all subject to public review.

8:39 a.m.

Hearing no further discussion or testimony, Senator Grossman moved that administrative procedure 4-14. of the Executive Director of the Department of Personnel be extended and asked for a no vote. Representative McGihon seconded the motion. Representative King asked if Senator Grossman is saying that by asking for a no vote that we affirm the bill as it is without the potential change they are asking? Senator Grossman said he is asking that before we move the bill forward, we strike the rule. A yes vote would keep the rule in the bill. Representative Carroll clarified that what the Committee is voting on is whether or not to extend the personnel rule. A no vote does not extend the personnel rule and the rule would cease to exist. A yes vote extends the personnel rule and rule would remain. Representative King said he would ask for a yes vote. Typically, the process has been to support the Office's interpretation of the rules. I understand the close nature of the call, but at the same time I think it's appropriate to vote yes on this. Representative Marshall said while I think the language of the rule could be different, it's not beyond the scope of their authority to promulgate this rule. I suggest either Ms. Romero or I or the other members try to work with the department to come up with a rule that's more fit. Senator Grossman said he comes at this the opposite way that Representative Marshall does. I agree our job is to determine whether or not the department acted within their constitutional or statutory authority. I think they did not. I don't know about flexibility. It probably is better to have more flexibility in the hiring process, and I confess I would be doing this Committee and our colleagues a greater service if I reviewed the case law more thoroughly, but I haven't had the opportunity. Based on the summary of the case law and the interpretation of the constitutional provision, I don't think the department has the authority to implement rules that include anything other than competitive examinations, and that they must, in their assessment, include competitive examinations in addition to the other assessment tools we talked about. As the rule stands, they could, though we haven't heard any testimony that they have, use other tools to make those decisions without relying on any competitive examination.

That's why I think, facially, the rule is deficient. If the vote goes the way I think it's going to and the rule is extended, I would hope Representative Marshall would go to the department and talk about maybe promulgating a more tightly worded rule. Representative McGihon said I agree with Senator Grossman and I would urge a no vote. My concern is that the rule has been extended beyond the scope of both constitutional and statutory language. I have had long conversations with Mr. Cartin about this. We looked at the definitions of selection and assessment. He gave me the case law he relied upon, which is a 1946 case and a 1955 case, where the Colorado supreme court has consistently discussed that the examination for candidates is supposed to be competitive in nature. I'm concerned that facially, the rule could be applied so that there would not be competitive examinations, and that's why I would ask for a no vote on the motion. The motion passed on a 5-2 vote, with Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Senator Groff voting yes and Senator Grossman and Representative McGihon voting no.

8:45 a.m.

Hearing no further discussion or testimony, Senator Grossman moved Senate Bill 06-106 to the committee of the whole with a favorable recommendation. Representative Hefley seconded the motion. The motion passed on a 7-0 vote, with Representative Carroll, Representative Hefley, Representative King, Representative Marshall, Representative McGihon, Senator Groff, and Senator Grossman voting yes.

8:45 a.m.

The Committee adjourned.